

***United States Court of Appeals
for the Second Circuit***



APPENDIX

74-1550

74-1550

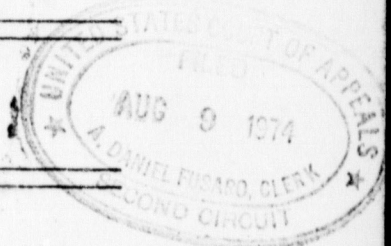
IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

NO. 74-1550

THE UNITED STATES OF AMERICA,
Plaintiff-Appellee,
-against-
CARMINE TRAMUNTI, et al.,
Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

253
DEFENDANTS-APPELLANTS' JOINT APPENDIX
Vol. T(41) - Pages 5504 to 5542



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1 hpl

2 UNITED STATES OF AMERICA
3 vs.
4 CARMINE TRAMUNTI, et al.

73 Cr. 1099

5 New York, March 12, 1974;
6 10.00 A.M.

7 Trial resumed.
8 - -

9 (In the robing room.)

10 MR. ELLIS: Judge, I learned yesterday or at
11 least I was told yesterday that the Bronx District Attorney's
12 office had made inquiries about John Barnaba's possible
13 connection in a homicide. These inquiries came some time
14 late in 1973 or possibly even early this year.

15 I would like a representation from the govern-
16 ment as to possible knowledge of those inquiries or any
17 information concerning John Barnaba's connection with a
18 homicide.

19 MR. PHILLIPS: I can represent to the Court
20 that some detectives from the Bronx District Attorney's
21 office visited my office I believe it was in December of
22 1973, possibly January, 1974. I think they talked to him
23 about the homicide of George Toutoian, a co-defendant in
24 this case. I believe that is what they talked to him
25 about.

1 hp2

2 Beyond that I don't know because I wasn't
3 present when they talked to him.

4 MR. ELLIS: Was any representative of the govern-
5 ment present, Mr. Phillips?

6 MR. PHILLIPS: No.

7 THE COURT: Where was he?

8 MR. PHILLIPS: He was in protective custody at
9 that point. So he was hardly a suspect.

10 THE COURT: Toutoian was killed, from what I
11 understand, December 24th.

12 MR. PHILLIPS: That's correct.

13 THE COURT: 1973.

14 MR. PHILLIPS: That's correct.

15 MR. FISHER: Your Honor, I think it would be
16 appropriate under these circumstances to ask the govern-
17 ment to produce Mr. Barnaba and we make a limited inquiry
18 of him under oath so we can determine whether or not he
19 was spoken to about the murder of Toutoian or another
20 murder.

21 Of course, the real question here is whether
22 or not he was spoken to as a suspect in a murder case or
23 someone who could provide the prosecution with information
24 regarding a murder case. If it's the former I think
25 there is a very grave issue with regard to motive here.

1 hp3

2 If it's the latter there is not. But I think we are under
3 an obligation here to determine which it is.

4 MR. ELLIS: My third-hand information -- maybe
5 it's not quite third-hand; second-hand -- is that he
6 was spoken to as a suspect. Your Honor, I would suggest
7 that that per se is Brady material.

8 MR. PHILLIPS: I can represent to the Court he
9 was not spoken to as a suspect. That much I know.

10 THE COURT: It's something I am going to take up
11 at some time in the future, not now.

12 MR. ELLIS: Thank you.

13 MR. WARNER: Judge, this doesn't have to be on
14 the record.

15 (Discussion off the record.)

16 MR. FISHER: Your Honor, following on that
17 application with regard to the information Mr. Ellis
18 provided us with, my application would be that the jury be
19 instructed right now to cease deliberations, that a hearing
20 proceed forthwith with regard to this question regarding
21 Barnaba, that in the event it is disclosed that Barnaba
22 is in fact a suspect for a murder case and that he has
23 discussed this with some representative of the State or
24 Federal prosecution, that the trial be reopened in front
25 of the jury, that that information be made known to the

1 hp4

2 jury on the issue of motive, and that they be then told to
3 continue their deliberations.

4 That is my application.

5 THE COURT: Denied.

6 MR. FISHER: Off the record.

7 (Discussion off the record.)

8 THE COURT: A robing room conference was held
9 at which Mr. Richman and Mr. Curran agreed the following
10 pages would be read in response to the jury's requests
11 contained in Exhibits 102 and 103:

12 1247, line 10, to 1260, line 25; 1319,
13 line 5, to 1330, line 14; 1559, line 10, to 1623,
14 line 23; 1834, line 5, to 1837, line 13; 1909,
15 line 18, to 1919, line 19; 3786, line 18, to 3996,
16 line 7; 4421, line 8, to 4432, line 14; 4696, line
17 2, to 4727, line 14; 5110, line 11, to 5117, line
18 18.

19 (In open court.)

20 THE COURT: I am going to have the clerk mark as
21 Court's Exhibit No. 105-A a note which reads as follows:

22 "To Judge Duffy:

23 "We would like to hear all testimony referring
24 to William Alonzo again.

25 "Thank you. Lucy Hare, Forelady."

1 hp5

2 MR. SUNDEN: Judge, just regarding Alonzo,
3 there was one little part of the testimony that I think
4 was irrelevant to Alonzo and mentioned someone else. If
5 I could speak to Mr. Phillips perhaps we could both agree
6 to delete it.

7 THE COURT: You will have a long time before we
8 even get to that.

9 MR. DOWD: Judge, this appears to be a very
10 length rereading and I would hope you wouldn't be offended
11 if on occasion we just leave for an hour.

12 THE COURT: Look, the one thing I don't want is
13 all the defense attorneys to get up with the exception of
14 Mr. Richman and walk out. That would indicate to the
15 jury that you have no interest in what they are doing, which
16 is untrue.

17 MR. CURRAN: Your Honor, I just talked with Mr.
18 Richman. This is in connection with the Tolopka re-
19 reading or reading. At page 5116, line 9, we have agreed
20 that the figure \$1300 should read \$13,000.

21 THE COURT: All right. Bring in the jury.

22 MR. WARNER: Your Honor, is the Tolopka
23 testimony about to begin?

24 THE COURT: Yes.

25 MR. WARNER: May I be excused?

1 hp6

2 THE COURT: Yes. You have a court appointment.
3 Is your client here, Mr. Cerialle?

4 MR. WARNER: Yes.

5 THE COURT: Mr. Ellis, would you cover?

6 MR. ELLIS: Yes.

7 THE COURT: Do you agree to this?

8 MR. CERIALE: Yes.

9 MRS. ROSNER: Your Honor, Mr. Fisher is outside.
10 I don't know if he wants to be present. Could I leave the
11 room for a moment to ask him if he wants to come in or
12 stay out.

13 MR. WARNER: I will ask him, Judge.

14 THE COURT: All right. I have another note.

15 "To Judge Duff:

16 "We are now waiting for the reading requested
17 regarding Ben Tolopka.

18 Thank you. Lucy Hare, Forelady."

19 Make it Court's Exhibit 106.

20 MR. RICHMAN: Your Honor, may I approach the
21 bench with Mr. Curran?

22 THE COURT: You have a problem?

23 MR. RICHMAN: No, no problem. Maybe it is better
24 to let them read it where they are comfortable, in the jury-
25 room, maybe with the court reporter.

1 hp7

2 THE COURT: No, no. What is going to happen if
3 that comes up is some juror is going to say something.
4 That is not what we are going to have.

5 (Court's Exhibits 105 and 106 marked for
6 identification.)

7 THE COURT: All right. Bring in the jury.

8 MRS. ROSNER: Your Honor, may I be excused for
9 a moment, just to read something? I will be right back.

10 THE COURT: You have five minutes. Don't read
11 a newspaper.

12 MRS. ROSNER: No.

13 (Jury present.)

14 THE COURT: Ladies and gentlemen, I have before
15 me three notes from the jury which I have had marked as
16 Court's Exhibits 102, 103 and 106.

17 103 reads: "We would like to hear the testimony
18 of Barnaba about Tolopka and the testimony of Tolopa's
19 witnesses defense."

20 Court's Exhibit 102 reads:

21 "We would like to receive the following:

22 "The summation remarks of the prosecuting
23 attorney, the summation remarks of the defense
24 attorney, the summary remarks of the Judge regarding
25 Benjamin Tolopka."

1 hp8

2 Court's Exhibit 106 says:

3 "We are now waiting for the reading requested
4 regarding Ben Tolopka."

5 I am going to ask the court reporter to read
6 the transcript which you indicated you wanted.

7 (Record read.)

8 THE COURT: Ladies and gentlemen, the court
9 reporter has been reading straight for just over an hour
10 and I think it's only fair that we take a break.

11 Mr. Marshal, will you take the jury out, please.

12 (The jury left the courtroom.)

13 THE COURT: You will note, Mr. Richman, that I
14 broke at the end of your cross-examination.

15 MR. RICHMAN: Yes, your Honor.

16 THE COURT: I would suggest that you all stay
17 here for just a minute until I go out and find out what
18 arrangements the marshals made about the jury's lunch.

19 (Pause.)

20 THE COURT: It's a good thing I went in to check
21 on the logistics of the jury's lunch. They requested
22 lunch in today and it arrived just about three minutes
23 ago.

24 Go out, have your lunch. Try to be back here
25 at one o'clock. Since they are eating in they are going

1 hp8a

2 to be sending me notes saying, "We are now ready to have
3 more testimony read."

4 (Luncheon recess.)

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hp9

A F T E R N O O N S E S S I O N

1.15 P.M.

(In open court.)

THE COURT: Bring back the jury.

(Jury present.)

(Record read.)

THE COURT: Ladies and gentlemen, we are going to let the court reporter have a rest for his vocal chords.

Mr. Marshal, will you take them out.

(Jury left the courtroom.)

MR. DOWD: I have an objection with respect to one part which I understood was to be read to the jury with respect to this particular request. I think it concerns page 5110, line 23, the reference to Casella and Russo. It's line 24. Will your Honor take a look at that?

THE COURT: I will take a look at it.

(Recess.)

(In open court.)

THE COURT: Mr. Lopez, as you know, we are running behind on notes.

MR. LOPEZ: Yes, your Honor.

THE COURT: 104 says: "Please cancel any requests for testimony and/or information re Joe Di Napoli." I am going to send them back a note reading:

1 hpl0

2 "Mrs. Hare, there is attached a Xerox copy of the note
3 which we have received. I am unaware of any request
4 'for testimony and/or information re Joe Di Napoli' which
5 we have not already responded to. Please advise me as
6 to what the attached note refers."

7 MR. LOPEZ: Fine, your Honor. Thank you.

8 THE COURT: We had a note last night -- this is
9 Court's Exhibit 101 -- from Hazel Hayman.

10 "Dear Judge Duffy:

11 "Can we consider testimony regarding conspiracy
12 as corroborative evidence on a substantive charge?

13 "Rather than calling us into court we would
14 appreciate it if you could answer us in writing."

15 "Mrs. Hayman, we have received your note,
16 a Xerox copy of which is attached. It is almost impossible
17 to give a precise answer to your question in its present
18 form. It would be preferable if you would phrase the
19 question in terms of the problem that you are encountering."

20 Anyone have any objections?

21 MR. LOPEZ: No.

22 THE COURT: I know the government would like a
23 yes answer to the second one, but the answer could be yes,
24 the answer could be no, and the answer could be maybe.
25 I don't want to give a wrong answer when we are shooting

1 hp11

2 in the dark.

3 Bring back the jury.

4 (Jury present.)

5 (Record read.)

6 THE COURT: In consideration of the vocal chords
7 of our court reporter, we are going to take a break.

8 All right, Mr. Marshal.

9 (Jury left the courtroom.)

10 THE COURT: Mr. Richman, you took exception to
11 my marshalling of the evidence because at one point I said
12 August.

13 MR. RICHMAN: That's correct, sir.

14 THE COURT: That is part of the things that they
15 want read back. I went through what the court reporters
16 took down. Apparently I did misspeak and say August.

17 Now, on rereading it I intend just to lightly
18 cross that off so that it will be read April. Do you
19 object to that?

20 MR. RICHMAN: No.

21 THE COURT: All right. Mr. Lopez, I would
22 like to see you inside.

23 (Recess.)

24 (In open court.)

25 MR. ELLIS: Your Honor, the defendant Mamone

1 hpl2

2 requests me to ask permission to voluntarily absent himself
3 for about an hour.

4 THE COURT: All right.

5 MR. ELLIS: Thank you.

6 MR. CURRAN: Your Honor, I wonder if just for
7 the sake of the record your Honor might consider inquiring
8 of the defendants who are here, in case lawyers aren't,
9 if that is okay, and if there are any lawyers here whose
10 defendants aren't, if that is okay, and if both are missing--

11 THE COURT: Yes. There have been a lot of
12 voluntary absences today, but it's understandable, since
13 we have been reading concerning only one defendant.

14 Let's go around the room, see who is here.
15 Mr. Tramunti is here, Mr. Siegal is here, Mr. Inglese is
16 not here.

17 MRS. ROSNER: He is.

18 THE COURT: He is in the back. All right.

19 Mrs. Rosner is here, Mr. Di Napoli is here,
20 Mr. Lopez is here, Mr. D'Amico is here, Mr. Rosenbaum is
21 here, Mr. Alonzo is here, Mr. Sunden is not.

22 MR. DOWD: He is just outside.

23 MR. CURRAN: He was out in the hall a minute ago.

24 THE COURT: All right. Mr. Christiano is
25 here, Mr. Fisher is here, Mr. Mamone was just given per-

1 hpl3

2 mission to absent himself, a voluntary absence, Mr. Ellis
3 is here, Mr. Pugliese is here.

4 MR.PUGLIESE: Your Honor, my lawyer went with
5 Mr. Mamone.

6 MR. LOPEZ: I will cover for Mr. Rosenberg in
7 behalf of Pugliese.

8 THE COURT: Mr. Pugliese, do you agree to that?

9 MR.PUGLIESE: Yes, sir.

10 THE COURT: Mr. Cerialle, I saw him walk in,
11 Mr. Warner is here, Mr. Tolopka and Mr. Richman I am sure
12 are here, Mr. Russo I spotted, Mr. Dowd is here, Mr. Robins
13 is here, Mr. Leighton is here, Mrs. Ware is here, Mr.
14 Panzer is here, Mr. Springer is here, Martin Jay Siegel
15 is here, Henry Salley I spot.

16 Mr. Salley, Mr. Pollak is not here.

17 MR. SIEGEL: I will cover for Mr. Pollak.

18 THE COURT: Is that going to be okay by you?

19 MR. SALLEY: Yes, sir.

20 THE COURT: Mr. Gamba I spotted and Mr. King is
21 here.

22 .All right. What is the next matter? 107
23 for identification.

24 "Dear Judge Duffy:

25 "We would like to see all the prosecution's

1 hpl4

2 exhibits pertaining to the defendant Tolopka.

3 "Lucy Hare, Forelady."

4 MR. RICHMAN: They had it already, your Honor.

5 THE COURT: They had it, but they handed it back
6 last night. So they are all in the locker inside. As soon
7 as they go back in again we will give it back to them.

8 (Court's Exhibits 101-A, 104-A, 107, marked
9 for identification.)

10 THE COURT: Let me explain to you what 101-A
11 and 104-A are.

12 As you recall, I read responses to particular
13 requests. I have taken the carbon copies of those responses
14 and made them 101-A and 104-A, so that the record is
15 complete.

16 MR. RICHMAN: Your Honor, that note says prose-
17 cution's exhibits.

18 THE COURT: I am going to give them all.

19 MR. RICHMAN: But there are no prosecution's
20 exhibits.

21 THE COURT: As I recall, there is one.

22 MR. RICHMAN: That was because --

23 THE COURT: I don't care what the reason is.
24 They are going to get them all back.

25 All right. Bring back the jury.

1 hp15

2 MR. DOWD: Your Honor, I asked about page 5110,
3 line 24.

4 THE COURT: We will take it up at the next
5 break. There is 40 minutes more of testimony and then --

6 MR. RICHMAN: Most of it is colloquy.

7 THE COURT: Then there is 45 minutes of your
8 summation.

9 MR. RICHMAN: That's right.

10 THE COURT: At which point we are going to have
11 to take a break. I am trying to do it an hour and five
12 minutes at a crack. It's kind of hard on the court reporter
13 to read for that length of time. It's straight reading.

14 (Pause.)

15 THE COURT: This one is a new one on me. I
16 asked the marshal to ask the jury to come out and they said
17 no. They asked for a couple of minutes. Apparently
18 they are talking about something.

19 Under the circumstances -- they are here.
20 All right.

21 (Jury present.)

22 THE COURT: The record should reflect that the
23 jury is here. Mr. Court Reporter, would you continue
24 reading.

25 (Record read.)

1 hpl6

2 MR. RICHMAN: Your Honor, I would request the
3 rest of Mr. Vismale's testimony be read.

4 THE COURT: Come up.

5 (At the side bar.)

6 MR. RICHMAN: It is page 4433 and 34.

7 MR. CURRAN: No objection.

8 (In open court.)

9 (Record read.)

10 THE COURT: Ladies and gentlemen, in the second
11 of the two notes which started this reading you requested
12 the summation of the government, the defense attorney and
13 what I believe you wanted was my attempt at summarizing the
14 evidence. We are going to do it the same way it was done
15 before you. The first one to be read, of course, will be
16 the summation by Mr. Richman. Then what we will try to do
17 is to cull out from the summation of Mr. Curran the part
18 that you are interested in. Then I will attempt to cull
19 out the summation of the evidence that I attempted to do,
20 which, of course, is not binding upon you.

21 All right. Start with Mr. Richman's summation.

22 (Record read.)

23 THE COURT: Mr. Reporter, stop there. I noticed
24 that one of the members of the jury asked to leave.

25 Mr. Marshal, will you take them all out.

1 hp17

2 (The jury left the courtroom.)

3 THE COURT: Let's us take ten too.

4 (Recess.)

5 (In the robing room.)

6 THE COURT: Mr. Dowd, you object, from what I
7 understand, to the reading of line 24 on page 5110 of Mr.
8 Curran's summation over to the first three words on line 3
9 at 5111.

10 MR. DOWD: I actually object to three words,
11 "Casella," -- is it three words? No, it's more.
12 "Al Casella, you remember Russo." That is what I most
13 strongly object to. That is my particular objection.

14 I have a feeling it's not really material to
15 this point and could be extraordinarily prejudicial if the
16 jury is still deliberating with respect to my client
17 because it's taken out of context, a very small reference,
18 and I submit it doesn't corroborate Barnaba. I object.

19 THE COURT: Go ahead.

20 MR. CURRAN: Your Honor, the government I think
21 is at a pretty good disadvantage when you go to summations
22 at all in a case like this because you are going to have
23 an hour or 45 minutes of Mr. Richman tearing apart a
24 government witness and making his pitch, which is, of
25 course, very proper and in order, and we are limited to

1 hp18

2 what we said about this defendant.

3 Fortunately, with respect to Tolopka, it's all
4 at least in one place and pulled together somewhat. But
5 I do think in the light of the defense summation, which
6 they requested, and passing the question as to whether
7 summations should be read to the jury at all, it seems
8 to me we have a right to get before the jury exactly what
9 we said in terms of how Barnaba was corroborated, and I
10 submit, your Honor, that Casella and, indeed, Mr. Russo
11 is very powerful corroboration of Barnaba in this case.

12 MR. DOWD: I don't agree, your Honor. I think
13 it's prejudicial effect far outweighs any value it might
14 have in respect to this particular point.

15 THE COURT: No. It should stay in.

4 16 (In open court.)

17 THE COURT: All right, let's go.

xx 18 (Court's Exhibit 108 marked for
19 identification.)

20 THE COURT: "To Judge Duffy:

21 "The note to 'please cancel any requests for
22 testimony and/or information re Joe Di Napoli'
23 was an error on my part. Such a request was never
24 submitted."

25 (Jury present.)

1 hpl9

2 THE COURT: Go ahead.

3 (Record read.)

4 MR. CURRAN: Your Honor, may Mr. Richman and I
5 briefly approach the bench? I don't think the reporter
6 is necessary.

7 (At the side bar; discussion off the record.)

8 (In open court.)

9 THE COURT: Ladies and gentlemen, I am going
10 to ask the court reporter, if his voice holds out, to
11 read my attempted summary of the evidence to you which I
12 gave during the charge.

13 Now, in my attempt to marshal the facts I told
14 you then, and I am going to tell you again, that is not
15 evidence. You have had all the testimony read to you
16 today. That is evidence. My attempted summarization,
17 if it does not accord with your recollection of the facts,
18 ignore my attempt. All right?

19 (Record read.)

20 THE COURT: Ladies and gentlemen, I think that
21 completely complies with your requests for the testimony
22 and the summations and the charge in connection with the
23 defendant Tolopka.

24 I had one other request, another note from you,
25 asking for the prosecution exhibits for the defendant

1 hp20

2 Tolopka. Actually last night I sent in all the exhibits.
3 They were kept overnight here. I should have left them
4 all in there, but I have to put them in a locker. That
5 is the reason they were taken away last night. I am going
6 to send them all back in to you as soon as we finish.

7 Shortly you will be going to dinner. I want
8 you to let me know when you get back when you want the
9 testimony of William Alonzo read. Just send me a note
10 to that effect.

11 Mr. Marshal, take the jury out, please.

12 (Jury left the courtroom.)

13 THE COURT: All right. The place that is off
14 limits tonight is the Attache Restaurant. I don't know
15 where it is.

16 MR. CURRAN: Your Honor, what time did you want us
17 back?

18 THE COURT: We may get a note between now and
19 6.30. I hope not. However, please be back here about 10
20 minutes to 8.

21 MR. SUNDEN: Judge, before you read that, there
22 is a clarification I want to make.

23 THE COURT: All right. Let's do it inside.

24 I think the record should indicate that the portions
25 of my charge read by the court reporter were as follows:

1 hp21

2 5252, line 7, to 5254, line 6; 5256, line 6,
3 to 5257, line 21; 5300, line 20, to 5309, line 13.

4 (Dinner recess.)

5 (At 8.00 P.M. a note was received from the
6 jury.)

7 (In open court.)

8 THE COURT: I have requested the clerk to mark
9 as Court's Exhibit 109 for identification another note
10 which I have received from the jury.

11 "Dear Judge Duffy:

12 "We received the exhibits on Ben Tolopka's
13 defense last night. We would like to see the
14 exhibits from Ben Tolopka's prosecution - I.E.

15 "The interrogation of Richard Forbrick about
16 which Ben Tolopka was questioned, the salary scale
17 of the Police Department, et cetera, et cetera.

18 "Sincerely, Lucy Hare, Forelady, Hazel Hayman.

19 "P.S. We would also like to see the 30-page
20 'biography' of John Barnaba."

21 In response I am going to tell them that they
22 received all exhibits accepted in evidence with regard to
23 Ben Tolopka, both prosecution and defense, that is, that
24 there is only one exhibit on the prosecution side, and that
25 is the one with the number rather than the letter. I am

1 hp22

2 going to tell them that the other matters involved in this
3 note have not been received in evidence and they cannot
4 consider them as exhibits.

5 Do I hear any objection to that?

6 MR. RICHMAN: None whatsoever, your Honor.

7 MR. CURRAN: Your Honor, in terms of telling
8 them they have received all exhibits, prosecution and
9 defense, could you just say they have received all exhibits,
10 without identifying one from the prosecution.

11 THE COURT: Apparently they have a hang-up that
12 they have not received the prosecution's --

13 MR. CURRAN: If your Honor tells them they have
14 received all exhibits received in evidence it seems to me
15 that covers it, without saying one from the prosecution and
16 ten from the defense.

17 THE COURT: I don't care. All right.

18 With that addendum, does anyone object?

19 MR. RICHMAN: No objection.

20 THE COURT: I am also considering very seriously
21 asking the jury or advising the jury that if they are so
22 inclined they may return a partial verdict, that is to say,
23 that they can return a verdict as against particular defend-
24 ants or involving particular counts.

25 I would like to hear first from the defense.

1 hp23

2 MR. LOPEZ: Your Honor, I think that many defense
3 counsel wish to object to this procedure. The grounds
4 for it is that there is a conspiracy count here and it
5 involves every single defendant seated at defense counsel
6 table, that a very important factor is the reliability,
7 the credibility, the believability of all the government
8 witnesses that have taken the stand, that, of course, if
9 this issue goes straight through it would be unfair to take
10 a partial verdict because some time during the deliberations
11 if they have already entered partial verdicts and then one
12 juror suggests or his view is accepted that the credibility
13 let us say of Pannirello or Barnaba or Stasi is now in
14 doubt they can no longer review the verdicts they have
15 already entered. I think such a procedure shortcuts
16 the full deliberation.

17 The jury, furthermore, has not indicated to us
18 that they are in any way deadlocked. Rather, to the
19 contrary, they have indicated by the notes that they have
20 submitted to this Court that they are speeding along with
21 their deliberations and they are coming to conclusions,
22 your Honor..

23 This has been a seven or eight-week trial,
24 your Honor. I don't think that in all fairness any of us
25 expected verdicts from this jury that would be quick or

1 hp24

2 prompt. I think we should not interfere or intervene or
3 interject ourselves with the jury's deliberations at this
4 stage.

5 So for many of the defendants I am entering an
6 objection.

7 MR. ROSENBAUM: May I add also that many of the
8 defense attorneys tried to attack the credibility of some
9 of the witnesses, Stasi, Barnaba, et cetera, and relied on
10 cross-examination, and it's possible that the jury in
11 eliminating some of the possible verdicts at this point
12 are eliminating some of the other cross-examination and
13 are just narrowing their scope on a particular defendant.
14 If they subsequently take over and check the entire cross-
15 examination they may discover certain facts which they did
16 not realize when they were eliminating from their delibera-
17 tions one particular defendant.

5 18 MR. FISHER: If your Honor please, I join in
19 what has been said and take a similar position and take
20 this opportunity to remind the Court of one of the notes,
21 which asked whether or not they could consider stuff on
22 the conspiracy count in substance as corroboration on a
23 later substantive count.

24 To give the Court a concrete example, they are
25 now obviously very carefully considering the case against

1 hp25

2 Mr. Tolopka and one of the issues that they focussed upon
3 was whether or not Barnaba came to set Mr. Tolopka up
4 with his trusty tape recorder.

5 If your Honor please, that is an issue that
6 looms large in the case against Donato Christiano and
7 Louis Inglese and the jury may well conclude that Mr.
8 Tolopka is in fact innocent and the jury may well conclude,
9 if that be the case, that Mr. Barnaba did in fact go to
10 see Mr. Tolopka and did in fact try to set him up on the
11 tape by asking for stuff when he was referring to jewelry,
12 and on that basis they may turn back and reconsider the
13 case against Christiano or the case against Inglese and
14 say yes, there is a similarity, there is a course of
15 conduct here where Barnaba was trying to set people up.

16 I think, joining in Mr. Lopez's remarks, we
17 cannot shortcut the deliberations of the jury at this time.
18 They should be allowed to deliberate as fully and com-
19 pletely as they wish.

20 Certainly, your Honor, I don't think the Court
21 should be allowed to -- I am sorry -- I don't think the
22 Court should by requesting what might --

23 THE COURT: I think, Mr. Fisher, that is a
24 matter of discretion with the Court.

25 MR. FISHER: If your Honor please, I think most

1 hp26

2 respectfully, your Honor, that even a suggestion tends to
3 in effect ask the jury for special verdicts in a real
4 sense, and again I would rely on the reasoning adopted
5 by the First Circuit in Spock. But I think for just that
6 one example that comes to mind here quite quickly it
7 would be inappropriate in this particular case certainly
8 at this particular time.

9 MR. ELLIS: Your Honor, I would suggest that
10 that initiative should come from the jury and not from the
11 Court. Each of the substantive counts they are con-
12 sidering is part and parcel of the conspiracy count and
13 I don't think that it would be fair or reasonable to try
14 to freeze the jury into a position with respect to frag-
15 ments of the conspiracy in any guise before they consider
16 the overview of the evidence, the overview of the credibili-
17 ty of the government witnesses.

18 It's perfectly obvious to me, in any event,
19 from the notes that their deliberations are taking a very
20 definite pattern and we should allow that pattern to run
21 its course before we interject ourselves into the delibera-
22 tions.

23 There is a sort of nominal theory at play here.
24 If they wake up tomorrow morning and find that they don't
25 believe a witness with respect to a particular count they

1 hp27

2 should have the opportunity to go back over what they have
3 done and reconsider.

4 MRS. ROSNER: Your Honor, if I might just add
5 this comment, the bulk of the defense in this case was
6 an attack on the credibility of the government witnesses.
7 In that light it's very difficult to understand how the jury
8 could conclude the guilt or innocence of any given defendant
9 without having assessed the evidence and the doubts in-
10 herent in the case against any other defendant. They all
11 hinge on each other, your Honor, because credibility is the
12 central theme.

13 The jury has been engaged in a careful and
14 detailed examination of the evidence as it applied to
15 several defendants. They haven't stammered in the course
16 of their deliberations, they haven't appeared to come to a
17 halt. It's taken long, but so did the trial, and a great
18 deal is at stake. I don't think anything should be done
19 to suggest to them that they are not proceeding apace
20 sufficiently to satisfy the Court or anyone else. I think
21 they should be allowed to continue.

22 THE COURT: On the other hand, I think you will
23 agree that up to this point the jury has no idea that they
24 can do this. The case was given to them on an all-or-
25 nothing basis and under those circumstances it may work to

1 hp28

2 the detriment of the defendants to insist that they continue
3 through on an all-or-nothing basis.

4 MRS. ROSNER: Your Honor, I can give one
5 concrete example that cuts against that.

6 I tied a conspiracy case in front of Judge
7 Griesa shortly before this one. The jury was allowed to
8 return partial verdicts. The first verdict was against
9 three defendants out of five. They acquitted two and con-
10 victed one.

11 Ultimately they hung on the other two, and they
12 indicated after they were discharged that had they had the
13 fate of that one man who was convicted before them at the
14 end of the deliberations they would not have convicted
15 because after further review of the evidence they were not
16 convinced of his guilt.

17 I saw that happen once in this courthouse in a
18 case much smaller than this, where the tendency to give
19 short shrift to any one man was much less than it is here
20 with sixteen defendants and I think we ought to avoid in
21 whatever way possible the conviction of any man here that
22 might be occasioned by an insinuation to the jury that they
23 ought to hasten their deliberations.

24 THE COURT: I am not suggesting that they hasten
25 it. I am suggesting that they can do it.

1 hp29

2 I can think of a concrete example on the other
3 end of the spectrum where partial verdicts were returned
4 acquitting people and afterwards the jury said, "Gee,
5 we hadn't thought of this or that or the other thing and
6 if we had and we had it to do over again we would find
7 them guilty." It cuts both ways.

8 MR. ELLIS: Judge, I think your Honor charged
9 very clearly that guilt here was individual and if the
10 jury understands that portion of your charge I don't
11 believe that we really will expedite the process by taking
12 away from them that which they have already decided, if
13 in fact they have decided.

14 Obviously what is taking long is that which
15 they haven't concluded yet.

16 THE COURT: I don't know that they decided any-
17 thing. I am just considering the possibility of advising
18 them that they can report if they have decided anything.

19 You want to be heard?

20 MR. CURRAN: Just briefly, your Honor. I think
21 your Honor has a clear right to do what your Honor is
22 considering.

23 However, the government's position is that we
24 feel that the jury should continue its deliberations.
25 We have seen no indication of a real problem. Our

1 hp30

2 position is that they should be allowed to continue.

3 However, I disagree with defense counsel when
4 they suggest that your Honor would be in error or has no
5 right to suggest to them that they may come in with partial
6 verdicts.

7 THE COURT: So do I.

8 MR. DOWD: Your Honor, let me make one simple
9 appeal to your discretion. It's simply that on a particular
10 point -- I am thinking about Count 16, the substantive count
11 dealing with Mr. Russo and an alleged transaction with Mr.
12 Barnaba in September, 1971 -- I would consider closely inter-
13 twined with the credibility of Mr. Barnaba as the jury might
14 find it in respect of Mr. Tolopka. It's possible.

15 Of course, now they have had another look at
16 some more testimony, more evidence, and the summations,
17 which are not evidence, which might bring them to draw
18 different conclusions than they had prior drawn in respect
19 to Mr. Barnaba's credibility.

20 Again, I would reemphasize the point in my own
21 respect that much and all of our case, my case particularly
22 for my client, was an attack in effect on the credibility
23 of the witnesses. That being the case, I think many of us
24 are very intertwined in this respect and I would ask that
25 you exercise your discretion in light of the apparent

1 hp31

2 unanimity, which is strange in itself, in not so informing
3 the jury at this time, since they have indicated no
4 difficulty at this point in their deliberations.

5 MR. LOPEZ: Your Honor, if you would permit just
6 one last thought.

7 Mrs. Rosner has indicated to us a situation
8 which might work adversely toward defense and your Honor
9 very rightfully has indicated another type of situation
10 which might work very favorably toward defense.

11 Why have any workings at all? Why not just
12 leave it up to the jury? The defendants are willing to stay,
13 defense counsel are willing to stay, the government has to
14 be here. Let's leave it up to the jury. Let them decide.
15 Let's not take chances, if the situation is going to work
16 favorable for the government or favorable for the defense.
17 Just let it run its course.

18 MR. POLLAK: Just for the record, your Honor,
19 I join the sentiments of defense counsel.

20 THE COURT: I assume that all defense counsel
21 are joining in the expressions of defense counsel. I
22 assume that all four gentlemen at the prosecution table
23 are joining in the sentiments expressed by Mr. Curran.

24 MR. ELLIS: Did I hear Mr. Curran say they better?

25 THE COURT: All right, I have heard you. I think

1 hp32

2 you know me well enough now to know when it's absolutely
3 necessary I can decide something relatively fast. I am
4 not going to do it now. I am going to think about it.

5 However, I still have to answer this note.
6 Bring back the jury.

7 MR. SUNDEN: Judge, regarding the testimony of
8 Alonzo, I was seeking to have a few moments aside because
9 I felt there were a few mistakes yesterday I wanted to
10 prove up.

11 THE COURT: Let me answer this note first, all
12 right?

13 MR. SUNDEN: Yes.

14 THE COURT: Let me take care of one thing at a
15 time. I am up to my ears in notes right now.

16 (Court's Exhibit 109 marked for
17 identification.)

18 (Jury present.)

19 THE COURT: Ladies and gentlemen, we received a
20 note from you which is now marked as Court's Exhibit 109
21 which refers to the exhibits on Ben Tolopka.

22 I want you to know that you can have all of the
23 exhibits presently in there which refer to Ben Tolopka.

24 You also refer to an interrogation of Richard
25 Forbrick. If there was such, and I don't know, I am not

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1 hp33

2 sure it was mentioned here. I don't know about that. But
3 it is certainly not evidence.

4 The salary scale of the Police Department is not
5 in evidence.

6 You mentioned a 30-page biography of John Barnaba.
7 That apparently was 3500 material which was turned over by
8 the government to the defense. While it may have been
9 offered in evidence, I refused to accept it in evidence,
10 and therefore you can't see it.

11 You can see anything that is in evidence. For
12 example, there are a lot of things like the Court's exhibit
13 which I referred to here, 109 for identification. The
14 reason it's for identification is to identify it. But
15 until it comes into evidence it is not to be considered
16 by you.

17 Now, I want you to go back and continue your
18 deliberations. I recognize that we still have outstanding
19 that you asked for the testimony with respect to William
20 Alonzo again. You let me know when you want it and we
21 will provide it without any problem.

22 At this point I know that you have been working
23 terribly hard and I have, unfortunately, worked you very
24 late at night, or -- let's put it this way -- a very full
25 day. Unfortunately I can't pay time and a half.

1 hp34

2 That's out of my hands.

3 However, please listen to one another, be patient
4 with one another, and let me know when you want the testi-
5 mony concerning Mr. Alonzo or anything else that is in
6 evidence.

7 (Jury left the courtroom.)

8 THE COURT: I recognize that the last part of
9 that was a little bit disjointed. I had the very strong
10 temptation -- it almost came out of my mouth -- to tell
11 them that I might be telling them about partial verdicts
12 later tonight. Since I promised you that I would consider
13 it I stopped. So I had to say something at the end. It's
14 a tough job.

15 (In the robing room.)

16 THE COURT: A robing room conference was held
17 at which it was agreed that the testimony of Pannirello to
18 be read with respect to Alonzo included the following pages:

19 2190, line 14, to 2193, line 14; 2459, line 10,
20 to 2460, line 23; 2464, line 6, to 2465, line 5;
21 2467, line 12, to 2472, line 14; 2475, line 23, to
22 2476, line 3; 2577, line 2, to 19.

23 MR. PHILLIPS: Your Honor, Court's Exhibit 105
24 reads: "We would like to hear all testimony referring to
25 William Alonzo again."

1 hp35

2 "Thank you, Lucy Hare, Forelady."

3 They previously heard at their request, which
4 specifically asked for the testimony of Harry Pannirello
5 regarding a drug transaction with William Alonzo, they
6 heard Harry Pannirello on direct, cross and redirect.

7 In light of this note, your Honor, the government
8 would submit that the testimony of James Provitera ought to
9 be given to them or, at the very least, they ought to be
10 asked if they want to hear it, because from page 2972, line
11 1, to page 2973, line 17, a page and a half of direct examina-
12 tion, Provitera discusses a narcotics transaction he had
13 with Harry Pannirello, Basil and William Alonzo.

14 MR. SUNDEN: My position would be that that
15 note, Court's Exhibit 105, can only be read in conjunction
16 with Court's Exhibit 93. They have had the testimony of
17 Harry Pannirello regarding a drug transaction with William
18 Alonzo read. They clearly have asked for testimony to be
19 read again, and I submit that by that "again" the jury is
20 clearly conveying that they are limiting it to the same
21 testimony to be read over again.

22 Certainly Provitera's testimony should not be
23 read on this request, but I think even for the Court to
24 inquire of the jury would, frankly, be suggesting to the
25 jury that they should hear that. I think a fair and clear

1 hp36

2 interpretation of the note means we should just reread the
3 testimony.

4 MR. PANZER: I am going to object also because
5 Hattie Ware is mentioned in that testimony and they haven't
6 requested any testimony with respect to her.

7 THE COURT: I think that the "again" refers to
8 the Pannirello stuff myself and I think that is all we
9 should read.

10 (At 9.40 p.m., a note was received from
11 the jury.)

12 (In open court.)

13 (Court's Exhibit 110 marked for
14 identification.)

15 THE COURT: I have received a note from the jury,
16 Court's Exhibit 110 for identification.

17 "Dear Judge Duffy:

18 "Would you please table the testimony which
19 we requested on William Alonzo. We will let you
20 know when we are ready.

21 "Sincerely, Lucy Hare, Madam Forelady."

22 That in itself is interesting, but the most
23 interesting thing is the P.S. "Thank you and good-night."

24 10 o'clock in the morning.

25 MR. ROSENBAUM: Your Honor, would it be possible

1 hp37

2 for Mr.Sunden to take over for me tomorrow morning for
3 about an hour?

4 THE COURT: Mr. D'Amico, your counsel has
5 requested permission to be out for about an hour, maybe
6 less.

7 MR. D'AMICO: Yes, that's fine.

8 THE COURT: Is it all right for Mr. Sunden to
9 represent you tomorrow morning?

10 MR. D'AMICO: Fine.

11 THE COURT: Mr. Sunden, are you willing to do it?

12 MR. SUNDEN: I am.

13 THE COURT: You will be here on time?

14 MR. SUNDEN: Yes.

15 MR. PANZER: Your Honor, I have the same applica-
16 tion with respect to Hattie Ware. Mr. Leighton will cover.

17 Your Honor, my client has left, but she will
18 consent to it. I will have Mr. Leighton put it on the
19 record.

20 THE COURT: Mr. Leighton, are you willing to
21 cover for Mr. Panzer in respect to Hattie Ware tomorrow?

22 MR. LEIGHTON: I have no objection, Judge.

23 THE COURT: No, ho. I don't want you to have
24 any objection.

25 MR. LEIGHTON: No, no. I will.

1 hp38

2 THE COURT: I leave it to you, one, to be on
3 time tomorrow, and, two, to remind me to get Hattie Ware's
4 consent on this.

5 MR. LEIGHTON: I will so remind you, and I will
6 be on time.

7 (Adjourned to Wednesday, March 13, 1974,
8 at 10.00 A.M.)
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